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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SOVANN SOTH et al., Defendants and Appellants.	B160935 (Los Angeles County Super. Ct. No. NA044491)

APPEAL from judgments of the Superior Court of Los Angeles County, John David Lord, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant Sovann Soth.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant Veasna Uy.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and John Yang, Deputy Attorney General, for Plaintiff and Respondent.

The defendants and appellants, Sovann Soth and Veasna Uy, appeal from the judgments entered following their convictions, by jury trial, for attempted murder, attempted voluntary manslaughter (Uy only), assault with a deadly weapon, and assault with a firearm (Uy only). (Pen. Code, §§ 664/187, 664/192, 245.)[1] Sentenced to a state prison term of 11 years (Uy) and 9 years (Soth), the defendants contend there was trial error.

The judgments are affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

The charges in this case arose out of two gang-related incidents that occurred on March 22, 2000. Both incidents involved the same assailants and the same intended victim.

In the first incident, three Asian males got out of an Acura Integra near Tenth and Orange in Long Beach. One of them pulled out a gun and fired at a young Hispanic male who was riding a bicycle. The gunman missed the bicyclist, but shot a bystander in the shoulder. J.G., passing by in a car, saw several Asian males get out of the Acura and one of them shoot at a bicyclist. J.G. picked defendant Uy out of a photo array as being one of the Asians who got out of the car.

Long Beach Police Officer Paul Esko responded to the scene of the shooting. He was approached by G.M., who said he had been riding his bicycle when an Acura Integra stopped and three Asian males got out. G.M. got scared and started riding quickly away. He saw one of the Asian males take a handgun from his waistband and he heard someone yell, "East Side Chongo." As the gunman fired, the other two Asian males were standing next to him.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Later that same afternoon, A.R. and E.J. were driving near Anaheim and Gaviota in Long Beach when they saw a car chasing a Hispanic male on a bicycle. Two young Asian males got out of the car and attacked the bicyclist. A.R. and E.J. told police one of the attackers hit the bicyclist with an anti-theft club device, and the other one punched him. Then one of the attackers took a small handgun from his waistband and fired a single round at the victim, who was lying on the ground. The two assailants ran back to their car and drove off.

Shortly thereafter, police officers spoke to G.M., who was bleeding from a head wound. G.M. said he had been shot, "that earlier in the day some guys had been shooting at him and missed, and that this time -- he thought it was the same guys, were actually able to hit him, shooting at him." One officer saw a bullet fragment still stuck to G.M.'s head. A paramedic who responded to the scene reported G.M. had suffered a gunshot wound to the head.

C.B. told police she and defendants Soth and Uy were riding in the Acura near Anaheim and Gaviota when they saw an Hispanic male "slipping," a term used by gang members to describe someone who is not on his guard against rival gang members. Soth had a gun in his pocket. Uy said, " 'Is that the same guy that threw the bottle at our car and hit us up[?]' " Soth indicated he wasn't sure. Thereafter, a fight ensued and C.B. heard a single gunshot. Afterward, Soth said to Uy, "I think I got him, but I'm not sure."

Detectives interviewed G.M. at the hospital. He appeared to have suffered a gunshot wound to the back of the head. G.M. said that about 1:00 p.m. he had been riding his bicycle when a car started following him. The car's occupants appeared to be from a rival gang, so G.M. rode down an alley north of Tenth Street. Two Asian males from the car shot at him and apparently hit a bystander. G.M. kept going. He later returned to the location and spoke to Officer Esko. Afterwards, as he was riding home, the same car appeared and cut him off. An Asian male got out of the car, said "Fuck you, Chongos," and punched G.M. in the stomach. "Chongo" was a derogatory name, used by Asian gang members, for the East Side Longo Gang. G.M. began fighting and then another Asian male got out of the car. G.M. told police, "[T]his guy exited the car and

came from behind him, as he was fighting with the first guy. [¶] He felt somebody hit him with some hard object in the back of his head. He . . . went down on the floor [*sic*] and . . . shortly after he heard a single gunshot coming from behind him. At that point . . . both of the male subjects ran back to the car and fled the area."

G.M. said the assailants in the second incident were the same ones who had attacked him in the first incident, and that each time he had been shot at by a different assailant. Shown photographic lineups, G.M. identified Uy as the person who shot him during the second incident, and Soth as one of the men who had been involved in the first incident.

At trial, G.M. testified he was a member of the East Side Longo street gang and that his gang did not get along with Asian gangs. G.M. recanted many of his police statements. He denied having been the victim of any shootings on March 22, 2000. He said he had merely had a fight with some Asian guys after he threw a bottle at their car. He denied anyone had used a gun. He injured his head when he fell during the fight. He could not say if either of the defendants was the person he had been fighting with that day. Someone must have forged his signature and initials on the photo arrays.

A gang expert testified Soth belonged to the Exotic Foreign Creation Coterie (EFCC), which consisted primarily of Cambodians. Uy was a member of the Tiny Rascals Gang (TRG). EFCC and TRG frequently united against the East Side Longos.

Dr. Jonathan Heard testified he examined G.M. on March 22, 2000, and found a superficial "through-and-through gunshot wound" to the head. This could have been "either a graze wound or a ricochet, off the skull." It did not look like a blunt force trauma wound. Dr. Matthew Kaplan, who also examined G.M. on March 22, 2000, had observed "a small entrance and exit wound to the head." G.M. told Kaplan he had heard one or two gunshots.

2. *Defense evidence.*

A ballistics expert, Lawrence Baggett, testified the medical evidence he reviewed regarding G.M.'s injury was inconclusive as to whether G.M. had been shot. He saw no

evidence of lead particles inside the wound, which made him doubt it had been caused by a gunshot.

B.R. had known Uy since high school. B.R., who was not a gang member, never saw Uy associate with gang members or participate in gang activities. B.R. knew Soth had tattoos and belong to the EFCC gang. Uy did not have tattoos, and B.R. had never seen him wearing gang attire.

Soth's mother testified there had been a birthday party for her daughter on March 22, 2000, which began at 10:00 a.m. She saw Soth eating at the party, but she was busy preparing food and did not watch him constantly. She saw him leave the party at 2:00 p.m. She also remembered Uy being at the party. Soth's sister testified Soth had been at her birthday until he left with Uy at 2:00 or 2:30 p.m.

Radiologist John Jordan testified CT scans of G.M.'s head wound revealed no evidence to indicate it had been caused by a gunshot. He saw no evidence of lead or metal particles, which he would expect to find in a gunshot wound. Jordan testified it was possible the wound had been caused by blunt force trauma. He never examined G.M. in person and could not say what had caused the two holes in his head. However, it was not impossible to have a gunshot wound without metal fragments, and he could not rule out the possibility G.M.'s injuries had been caused by a gunshot.

3. *Proceedings*.

Uy was convicted for involvement in both incidents. For his involvement in the first incident, during which the bystander was shot, Uy was convicted of attempted voluntary manslaughter and assault with a firearm. For his involvement in the second incident, during which G.M. was shot, Uy was convicted of attempted murder and assault with a deadly weapon. Soth was acquitted of involvement in the first incident, but convicted of attempted murder and assault with a deadly weapon for his involvement in the second incident.

CONTENTIONS

1. The jury instructions failed to require a finding of intent to kill in connection with the attempted murder verdicts.

2. The evidence was insufficient to support Uy's conviction for attempted voluntary manslaughter and assault with a firearm.

3. CALJIC 8.43 is defective because it defines voluntary manslaughter in terms of reducing a murder finding to manslaughter.

4. An error in the abstract of judgment must be corrected.

DISCUSSION

1. *Attempted murder instructions were not defective*.

Defendants contend the attempted murder instructions were defective because they did not require the jury to find they intended to kill G.M. during the second incident. This claim is meritless.

Defendants argue that, although the jury was instructed on the intent to kill element of attempted murder, the trial court failed to give a proper unanimity instruction and then failed to have the jury specify the grounds for its attempted murder verdicts. The jury was instructed it did not have to agree on a particular theory of liability so long as it unanimously agreed each defendant was guilty of attempted murder during the second incident.[2]

Such "no unanimity on theory" instructions are proper. "[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. (See generally *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1026, . . .)" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; see also *People v. Santamaria* (1994) 8 Cal.4th 903, 918 ["the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator"].) Defendants

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[2] The trial court instructed: "For the defendant to be found guilty of . . . attempted murder, you must unanimously agree that the defendant is guilty of the crime alleged. You need not unanimously agree on whether the defendant was a direct participant in the crime or as [*sic*] an aider and abettor in the crimes. [¶] You need not agree as to the manner and means by which the attempted murder was committed."

are wrong to assert the jury had to agree whether the assault had been committed with the gun or with the car club.

Part of defendants' claim appears to rest on the misconception that a finding of intent to kill could not, as a matter of law, have been based on the assault with a deadly weapon finding. Defendants mistakenly assume "the evidence was legally insufficient to prove an attempted murder if [G.M.] was [merely] struck with a car club" because the anti-theft device was not inherently a deadly weapon.

In fact, a deadly weapon within the meaning of section 245, subdivision (a)(1), "is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' " (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029; see *ibid.,* at p. 1035 ["There can be no doubt that some footwear, such as hobnailed or steel-toed boots, is capable of being wielded in a way likely to produce death or serious injury, and as such may constitute weapons within the meaning of section 245, subdivision (a)(1)"]; *People v. Arcega* (1982) 32 Cal.3d 504, 519 [evidence victims had been "struck several times on the head with a heavy, blunt object . . . . tend[s] to establish . . . intent to kill"]; *People v. Cook* (1940) 15 Cal.2d 507, 517 [two foot long piece of two-by-four was deadly weapon]; *People v. Russell* (1943) 59 Cal.App.2d 660, 665 [fingernail file "may become . . . a dangerous and deadly weapon if used in such a manner as to produce great bodily injury"].) Hence, defendants are wrong to assert the evidence was "clearly insufficient to demonstrate [they] intended to kill the victim if they merely struck him with the car club."

Defendants also mistakenly view the second incident in isolation from the first incident; i.e., they appear to assume the only valid evidence of intent to kill is what transpired during the second incident. The evidence showed that the two incidents, which occurred within hours of each other, were part of a continuous transaction. The defendants first attacked G.M. at one location, but he escaped on his bicycle. Shortly thereafter, the defendants spotted G.M. again and attacked him a second time. Given evidence showing the defendants were involved in both incidents, it was reasonable to conclude the second attack was an attempt to 'finish the job.'

As the trial court told defense counsel, and as the prosecutor argued to the jury,[3] the two incidents should be viewed cumulatively, not in isolation: "[I]f earlier they're shooting at the person, and then when they catch up with him later, anything that could result in death, I think, the jury could conclude was an attempt to murder. [¶] Because . . . shooting is inherently down that path. And if they [i.e., the jurors] believe they shot at him earlier, then they could believe even one strike with the club was an attempted murder." Defendants' argument ignores the essential connection between the two incidents, and it was this connection which so strongly tended to show both defendants acted with intent to kill when they jointly attacked G.M. the second time.

Defendants argue the trial court's aiding and abetting instructions were defective for "not specifically instruct[ing] the jury that the individual who discharged the weapon had to possess a specific intent to kill the victim." Not so. The trial court gave all the requisite standard instructions needed to guide the jury in this matter. The trial court defined the crimes of assault with a deadly weapon and attempted murder, including the element that the perpetrator of the attempted murder must have had a specific intent to kill. The trial court defined accomplice liability under the natural and probable consequences doctrine, and explained how an attempted murder verdict could be based on assault with a deadly weapon under the natural and probable consequences doctrine.

Defendants argue the natural and probable consequences instruction did not remedy the unanimity problem because, although it properly "dispensed with the need for the jury to find that the aider and abettor share[d] the murderous intent of the shooter," it "did not dispense with the requirement that the shooter possess the specific intent to kill the victim."

This argument is apparently based on the misconception an aider and abettor can be liable for no greater offense than is the direct perpetrator. "Because aiders and

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[3] The prosecutor argued, "What evidence do we have of the specific intent to kill? [¶] Well, on two different occasions these people shot at him, whacked him with the club and shot at him again. [¶] So you can use each of those incidents to show the specific intent to kill on both incidents."

abettors may be criminally liable for acts not their own, cases have described their liability as 'vicarious.' [Citation.] This description is accurate as far as it goes. But, as we explain, the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state. [¶] It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.] Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) However, "[a]ider and abettor liability is . . . vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. When a person 'chooses to become a part of the criminal activity of another, she says in essence, "your acts are my acts . . . . " ' [Citation.] But that person's *own* acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's." (*Id.* at p. 1118.)

Defendants try to distinguish *McCoy* by noting that case involved a situation in which the actual perpetrator had a less culpable state of mind than the accomplice. But, as *McCoy* also pointed out, "the dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator . . . . The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. *It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role*."

(*People v. McCoy, supra,* 25 Cal.4th at p. 1120, second italics added.) Here, regardless of which defendant used the club and which used the gun during the second attack, the evidence showed both defendants had intent to kill, particularly when viewed in connection with the first attack.

2. *Sufficient evidence to convict Uy on count 1 and 2.*

Uy contends the evidence was insufficient to sustain his conviction on counts 1 and 2 (attempted voluntary manslaughter and assault with a firearm), arising out of the first incident, because the People did not prove he was one of the assailants. This claim is meritless.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*People* v. *Rodriguez* (1999) 20 Cal.4th 1, 11.)

Uy argues the evidence did not credibly show he was involved in the first incident because at trial G.M. denied having identified him to police. But this argument ignores the fact G.M. was doing his best to be an uncooperative prosecution witness, and it ignores the evidence showing G.M.'s recantation lacked credibility. Moreover, G.M. also told police the *same* assailants had been involved in *both* incidents, evidence which credibly put Uy at the scene of the first incident.

In addition, J.G., an independent eyewitness, picked Uy out of a photo array as being one of the perpetrators. Although at trial J.G. characterized his identification as less than certain, it was sufficient. "It is a familiar rule that 'In order to sustain a

conviction the identification of the defendant need not be positive. [Citations.] Testimony that a defendant "resembles" the robber [citation] or "looks like the same man" [citation] has been held sufficient.' " (*People v. Barranday* (1971) 20 Cal.App.3d 16, 22; see *People v. Cooks* (1983) 141 Cal.App.3d 224, 278 [identification evidence sufficient where witness 90 percent sure]; *People v. Wiest* (1962) 205 Cal.App.2d 43, 45 ["qualification of identity and lack of positiveness" go to weight of evidence].) When J.G. made the identification, he told police the photo of Uy "looked like" the perpetrator.

There was sufficient evidence to prove Uy had been one of the assailants during the first incident.

3. *Voluntary manslaughter instruction was correct*.

Defendants contend their convictions for attempted murder must be reversed because the jury instructions on the relationship between attempted murder and attempted voluntary manslaughter were erroneous. This claim is meritless.

The trial court gave the standard instruction defining voluntary manslaughter, CALJIC No. 8.43, which said: "To *reduce* a killing upon a sudden quarrel or heat of passion from an attempted murder to attempted voluntary manslaughter, the attempted killing must have occurred while the perpetrator was acting under the direct or immediate influence of the quarrel or heat of passion. [¶] Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused, and sufficient time has elapsed for an angry passion to end and for reason to control his conduct, it will no longer excuse express or implied malice and *reduce* the killing to voluntary manslaughter." (Italics added.)

Defendants argue the italicized references to "reducing" an attempted homicide from attempted murder to attempted voluntary manslaughter impermissibly lowered the prosecution's burden of proof and improperly told the jury it had to consider the charges in a particular order. We disagree.

For their burden of proof argument, defendants rely on *People v. Owens* (1994) 27 Cal.App.4th 1155, which held it was improper to instruct a jury with the phrase "[t]he People have introduced evidence tending to prove," because this language "carries the

inference that the People have, in fact, established guilt." (*Id.* at p. 1158.) But there is no similar language in the instruction challenged here, which merely defined the elements of an offense.

The instruction here did not refer to the quantity or quality of the prosecution's evidence. Of course, " ' "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) "If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Smithey* (1999) 20 Cal.4th 936, 963.)

Here, comprehensive instructions were given regarding murder and manslaughter, and the prosecution's burden of proof in this specific regard was clearly spelled out: "To establish that [the] attempted killing is attempted murder and not attempted voluntary manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of attempted murder, *and that the act was not done* in a heat of passion or upon a sudden quarrel." (Italics added.)

Citing *People v. Kurtzman* (1988) 46 Cal.3d 322, defendants argue the instruction was defective because, in effect, it impermissibly directed the jury to consider the charges in a particular order. But in *Kurtzman*, the trial court ordered the jury not to deliberate on a voluntary manslaughter charge until it had reached a verdict on a second degree murder charge. Here, nothing in the instructions told the jury it had to deliberate on attempted murder before deliberating on attempted voluntary manslaughter. In fact, the jury was instructed that, in considering the lesser included offense of attempted voluntary manslaughter, "you have the discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it."

4. *Abstract of judgment must be corrected.*

Uy was sentenced to state prison for a total of 11 years, which consisted of the upper term of 9 years on count 3, a consecutive one-year term on count 1 and another consecutive one-year term on count 2. However, the abstract of judgment switched the

sentences for count 3 and count 1, incorrectly indicating Uy was given the 9-year term on count 1. The abstract of judgment should be corrected to reflect the actual judgment pronounced by the trial court. (See *People v. Hong* (1998) 64 Cal.App.4th 1071, 1075.)

DISPOSITION

The judgments are affirmed. The clerk of the superior court shall correct Uy's abstract of judgment as indicated above.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.